

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

## **FACTUAL HISTORY**

On December 21, 2016 appellant, then a 53-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment. He noted that he first became aware of his condition and first realized its relation to his federal employment on December 21, 2016. Appellant explained that his recent hearing examination indicated abnormal hearing results. He did not stop work.

In a January 5, 2017 development letter, OWCP informed appellant that it had not received any evidence in support of his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate development letter of even date, OWCP requested that the employing establishment provide additional information, including comments from a knowledgeable supervisor, regarding appellant's occupational disease claim. It afforded both parties 30 days to respond.

In an August 10, 2016 medical report, Dr. Karl Gildiner, Board-certified in occupational medicine, checked a box indicating that appellant's hearing was outside the normal hearing range and recommended that he undergo further hearing evaluation.

In response to OWCP's questionnaire, appellant submitted a January 18, 2017 statement in which he explained that on or about July 5, 2016 he underwent an audiogram examination performed by Dr. Gildiner that revealed significant binaural hearing loss. Dr. Gildiner opined that the hearing loss was much greater than what could be attributed to the aging process and believed that it was related to exposure to loud noise while performing his duties as a border patrol agent. Appellant also indicated that he experienced chronic tinnitus. He detailed his history of federal employment beginning in July 1997 in which he was exposed to sounds of gun fire as a part of quarterly weapons qualifications and over 600 hours of firearms training. Appellant noted that the hearing protection provided early in his career did not fit well. He related that he continued to be exposed to loud noises as a part of his duties during quarterly firearms training. Appellant concluded by stating that he had never filed a claim for workers' compensation relating to hearing loss and that he first noticed his hearing loss about two years prior.

In an undated statement, the employing establishment concurred with appellant's allegations that he suffered hearing loss due to factors of his federal employment and submitted information relating to the noise he encountered during quarterly firearms qualifications.

On March 14, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the medical record to Dr. William Smith, Board-certified in otolaryngology, for a second opinion evaluation to determine the nature and extent of any employment-related conditions.

In his March 27, 2017 medical report, Dr. Smith reviewed the SOAF, history of injury and the medical evidence of record. He noted very mild hearing loss in the high frequencies at 6,000 and 8,000 Hertz (Hz) of 30 decibels (dBs) in the right ear and of 30 dBs at 8,000 Hz in the left ear. Dr. Smith opined that the workplace exposure as described to him was sufficient to have caused appellant's sensorineural hearing loss. He reviewed appellant's audiometric testing results and, using the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*,<sup>3</sup> (A.M.A., *Guides*), found at 500, 1,000, 2,000, and 3,000 Hz losses of 15, 10, 20, and 20 dBs on the right, respectively; and 15, 15, 20, and 20 dBs on the left, respectively. Dr. Smith found one percent binaural hearing loss, allowing one percent for tinnitus. He diagnosed very mild hearing loss at 6,000 Hz and above, bilaterally, and opined that appellant's hearing loss was not due to noise exposure in his federal employment. Dr. Smith reasoned that mild hearing loss was less than expected from presbycusis. He recommended that appellant continue to be very compulsive about noise protection.

By memorandum dated May 26, 2017, OWCP requested clarification from Dr. Smith as the SOAF had been updated to reflect appellant's employment history.

OWCP subsequently received a supplemental report from Dr. Smith, wherein he further explained that appellant's hearing was better than expected by presbycusis and again opined that it was unlikely that his federal employment contributed to his mild hearing loss.

By decision dated July 20, 2017, OWCP denied appellant's occupational disease claim, finding that the medical evidence was insufficient to establish that his hearing loss was causally related to the accepted factors of his federal employment.

On July 29, 2017 appellant requested reconsideration of OWCP's July 20, 2017 decision.

In an August 15, 2017 audiometric evaluation, Dr. James Fowler, Board-certified in otolaryngology, diagnosed mild-to-severe hearing loss in appellant's right ear and mild-to-moderate hearing loss in his left ear. He opined that appellant's conditions were related to his occupational noise exposure. In an August 23, 2017 medical note, Dr. Fowler again opined that appellant's sensorineural hearing loss was work related.

By decision dated September 11, 2017, OWCP denied modification of its July 20, 2017 decision, finding that evidence submitted with appellant's request for reconsideration did not contain a complete history of his condition and did not provide a well-reasoned medical opinion explaining how the diagnosed condition was caused by his federal employment.

OWCP subsequently received an August 23, 2017 medical report, wherein Dr. Fowler diagnosed occupational exposure to noise and explained that it occurred when a patient was wearing faulty earplugs and worked in a loud noise environment, such as shooting weapons for many years without proper equipment. Dr. Fowler also attached a copy of the previous August 15, 2017 audiometric evaluation results.

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

On October 18, 2019 appellant requested reconsideration of OWCP's September 11, 2017 decision. In an accompanying statement dated October 14, 2019, he again detailed his history of noise exposure at work. Appellant also provided a chart listing the proper amount of protection he needed for firearms qualifications.

In an October 2, 2019 audiometric evaluation, Dr. Fowler diagnosed moderate-to-severe binaural sensorineural hearing loss and opined that, without a doubt, appellant's hearing loss was related to his work history.

By decision dated December 19, 2019, OWCP denied appellant's October 18, 2019 request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

### **LEGAL PRECEDENT**

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.<sup>4</sup> This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>5</sup> The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.<sup>6</sup> Timeliness is determined by the document receipt date (*i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS)).<sup>7</sup> The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.<sup>8</sup>

OWCP may not deny a request for reconsideration solely because the application was not timely filed. When a request for reconsideration is untimely filed, it must nevertheless undertake a limited review to determine whether the request demonstrates clear evidence of error.<sup>9</sup> OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's request for reconsideration demonstrates clear evidence of error on the part of OWCP.<sup>10</sup>

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<sup>4</sup> 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

<sup>5</sup> 20 C.F.R. § 10.607(a).

<sup>6</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4a (February 2016).

<sup>7</sup> *Id.* at Chapter 2.1602.4(b) (February 2016).

<sup>8</sup> *See R.L.*, Docket No. 18-0496 (issued January 9, 2019).

<sup>9</sup> *See* 20 C.F.R. § 10.607(b); *G.G.*, Docket No. 18-1074 (issued January 7, 2019).

<sup>10</sup> *Id.* at § 10.607(b); Federal (FECA) Procedure Manual, *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>11</sup> The Board notes that clear evidence of error is intended to represent a difficult standard.<sup>12</sup> Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.<sup>13</sup> It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.<sup>15</sup> In this regard, the Board will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>16</sup> The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.<sup>17</sup>

### ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

A request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.<sup>18</sup> As appellant did not request reconsideration until October 18, 2019, more than one year after the issuance of OWCP's September 11, 2017 merit decision, it was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in its September 11, 2017 decision.<sup>19</sup>

The Board further finds that appellant's reconsideration request failed to demonstrate clear evidence of error on the part of OWCP in its last merit decision. OWCP denied his occupational disease claim finding that he had not submitted sufficient medical evidence containing a physician's opinion as to how his hearing loss was causally related to the accepted factors of his

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<sup>11</sup> *G.G.*, *supra* note 9.

<sup>12</sup> *M.P.*, Docket No. 19-0200 (issued June 14, 2019); *R.L.*, *supra* note 8.

<sup>13</sup> *E.B.*, Docket No. 18-1091 (issued December 28, 2018).

<sup>14</sup> *J.W.*, Docket No. 18-0703 (issued November 14, 2018).

<sup>15</sup> *P.L.*, Docket No. 18-0813 (issued November 20, 2018).

<sup>16</sup> *D.G.*, 59 ECAB 455 (2008); *A.F.*, 59 ECAB 714 (2008).

<sup>17</sup> *W.R.*, Docket No. 19-0438 (issued July 5, 2019); *C.Y.*, Docket No. 18-0693 (issued December 7, 2018).

<sup>18</sup> 20 C.F.R. § 10.607(a).

<sup>19</sup> *Id.* at § 10.607(b); *S.M.*, Docket No. 16-0270 (issued April 26, 2016).

federal employment. The evidence submitted failed to raise a substantial question concerning the correctness of OWCP's September 11, 2017 decision.<sup>20</sup>

Appellant submitted medical evidence from Dr. Fowler dated August 15 and 23, 2017 and October 2, 2019 in which he performed audiometric evaluations and diagnosed moderate-to-severe binaural sensorineural hearing loss. Dr. Fowler opined that, without a doubt, appellant's hearing loss was related to his work history. The Board notes, however, that his medical evidence did not provide a clear explanation on how appellant's diagnosed condition was causally related to the factors of his federal employment.<sup>21</sup>

As noted, the term clear evidence of error is a difficult standard and it is not enough to show that the evidence could be construed to produce a contrary conclusion.<sup>22</sup> None of the evidence submitted by appellant in connection with his untimely reconsideration request manifests on its face that OWCP committed an error in denying his occupational disease claim. Appellant has not submitted evidence of sufficient probative value to raise a substantial question as to the correctness of OWCP's decision.<sup>23</sup> Thus, the evidence of record is insufficient to demonstrate clear evidence of error.

Accordingly, the Board finds that OWCP properly denied his reconsideration request, finding that it was untimely filed and failed to demonstrate clear evidence of error.

On appeal appellant contends that he retired and relocated after OWCP's September 11, 2017 decision and never received notification of its decision, as he was under the impression that his mail would be forwarded to his new address. The Board has held, in the absence of evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is known as the mailbox rule.<sup>24</sup> If a claimant changes his or her address, the onus is on the claimant to notify OWCP of this change in writing.<sup>25</sup> There is no evidence in the record that appellant provided OWCP written notification of his change of address. Thus, without evidence to the contrary, appellant is presumed to have received the September 11, 2017 decision.

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<sup>20</sup> See *P.T.*, Docket No. 18-0494 (issued July 9, 2018).

<sup>21</sup> *K.V.*, Docket No. 18-0723 (issued November 9, 2018).

<sup>22</sup> *Supra* note 14.

<sup>23</sup> *Supra* notes 11 and 12.

<sup>24</sup> See *A.J.*, Docket No. 18-0830 (issued January 10, 2019); see also *R.M.*, Docket No. 14-1512 (issued October 15, 2014); *V.M.*, Docket No. 06-0403 (issued December 15, 2006).

<sup>25</sup> *M.P.*, Docket No. 17-0046 (issued June 9, 2017).

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, finding that it was untimely filed and failed to demonstrate clear evidence of error.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 19, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2020  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board